FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

E. MOLNER WHOLESALE LIQUOR COMPANY, INC., a corporation; JOSEPH M. ARMELLI dba ASSOCIATED LIQUOR PRODUCTS CO., and STEWART-REYNOLDS CO., INC., a corporation,

Petitioners and Appellants,

vs.

THOMAS W. MARTIN, Director, Department of Alcoholic Beverage Control, State of California; and DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, STATE OF CALIFORNIA,

Defendants and Respondents,

and

THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE SECOND APPELLATE DISTRICT,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

DUKE-MOLNER WHOLESALE LIQUOR COMPANY, INC., a corporation; JOSEPH M. ARMELLI dba ASSOCIATED LIQUOR PRODUCTS CO., and STEWART-REYNOLDS CO., INC., a corporation,

Petitioners and Appellants,

vs.

THOMAS W. MARTIN, Director, Department of Alcoholic Beverage Control, State of California; and DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, STATE OF CALIFORNIA,

Defendants and Respondents,

and

THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE SECOND APPELLATE DISTRICT,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of the State of California, Second Appellate District, entered on May 16, 1960, whereby the judgment of the Superior Court of the State of California in and for the County of Los Angeles upholding Rule 28 of the California Alcoholic Beverage Control Department was affirmed: Petition for Rehearing was denied on June 1, 1960; and Petition for Hearing in the California Supreme Court was denied July 12, 1960.

The plaintiffs filed a complaint for declaratory relief and injunction, seeking a declaration of the rights of the plaintiffs and defendants under Rule 28 adopted by the California Alcoholic Beverage Control Department, and an injunction restraining the enforcing of said Rule 28 [Clk. Tr. pp. 1-29].

A temporary restraining order was issued by the Court on August 8, 1957, restraining the defendants from putting into effect and enforcing said Rule 28 [Clk. Tr. pp. 30-31].

A preliminary injunction was issued by the Court on August 28, 1957, enjoining and restraining the defendants during the pendency of the action, or until the Court shall otherwise order, from enforcing or putting into effect said Rule 28 [Clk. Tr. pp. 42-43].

On the conclusion of the trial of said action a judgment was rendered by the Court declaring that Rule 28 is not arbitrary, discriminatory or punitive, and is not in violation of due process of law or the Fourteenth Amendment to the United States Constitution, and that said Rule 28 is authorized by the Constitution and laws of California and binding upon plaintiffs as wholesale distilled spirits licensees, and may be enforced by defendants; the judgment further provided that plaintiffs are not entitled to any injunction or further relief, and that the preliminary injunction heretofore issued be dissolved [Clk. Tr. pp. 98-99].

An appeal was duly taken by the petitioners to the District Court of Appeal, Second Appellate District Division One, and the District Court of Appeal affirmed the judgment of the Superior Court.

A petition for rehearing was timely filed with the District Court of Appeal and denied on June 1, 1960.

A petition for hearing in the California Supreme Court was timely filed and denied on July 12, 1960.

Opinions Below.

The opinion of the Court below, District Court of Appeal of the State of California in and for the Second Appellate District, affirming the judgment of the Superior Court of the State of California in and for the County of Los Angeles, upholding Rule 28, is reported in 180 A. C. A. 901, 4 Cal. Rep. 904.

A petition for rehearing in the District Court of appeal was denied on June 1, 1960 (181 A. C. A. No. 2, Minutes, p. 2).

A petition for hearing in the California Supreme Court was denied July 12, 1960. (not reported yet.)

Jurisdiction.

The judgment of the District Court of Appeal was entered May 16, 1960.

The petition for rehearing in the District Court of Appeal was denied June 1, 1960.

A petition for hearing in the California Supreme Court was denied July 12, 1960.

The constitutional issues here presented were urged in the lower Court. The jurisdiction of this Court is invoked under 28 U. S. C. A. Sec. 1257 (3).

Question Presented.

Is Rule 28 of the California Alcoholic Beverage Control Department valid?

Statutes and Constitutional Provisions Involved.

Section 1 of the Fourteenth Amendment, United States Constitution, provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The pertinent provisions of Section 22(d) of Article XX of the California Constitution are:

> . . . "The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any laws prohibiting conduct involving moral turpitude. It shall be unlawful for any person other than a licensee of said department to manufacture, import or sell alcoholic beverages in this State."

Section 23021 of the California Business and Professions Code provides:

> "'Wholesaler.' 'Wholesaler' means every person other than a manufacturer, wine grower, or rectifier who is engaged in business as a jobber or wholesale merchant, dealing in alcoholic beverages."

Section 23378 of the California Business and Professions Code provides:

> "Wholesaler's license. Any wholesaler's license authorizes the sale of the alcoholic beverage specified in the license only to persons holding licenses issued by the department authorizing the sale of the alcoholic beverage, and authorizes the exportation of the alcoholic beverage."

Section 23379 of the California Business and Professions Code provides:

> "Beer and wine wholesaler's license: Additional rights. A beer and wine wholesaler's license also authorizes the labeling, bottling, or packaging of wine in accordance with and subject to the rules of the State Department of Public Health. A beer and wine wholesaler's license shall not permit the sale or delivery of wine to consumers in containers supplied, furnished, or sold by the consumer."

Section 23776 of the California Business and Professions Code provides:

> "Wholesaler's license. A wholesaler's license shall not be issued to any on-sale licensee."

Section 23777 of the California Business and Professions Code provides:

> "Off-sale general license. No off-sale general license shall be renewed or issued to a distille

spirits wholesaler whose premises are located in a city having a population of 50,000 or more, as shown by the 1940 federal census, or to a distilled spirits wholesaler who sells distilled spirits to licensees whose premises are located in any city having a population of 50,000 or more, as shown by the 1940 federal census."

Section 23778 of the California Business and Professions Code provides:

"Distilled spirits wholesaler's license. A distilled spirits wholesaler's license shall not be held by any person unless at all times throughout the license year he has on his wholesale premises a reasonable stock of distilled spirits, as determined by the department, for which he has fully paid lawful money or its equivalent."

Section 23779 of the California Business and Professions Code provides:

"Wholesale license. No wholesale license shall be issued to any person who does not in good faith actually carry on or intend to carry on a bona fide wholesale business by sale to retail licensees of the alcoholic beverage designated in the wholesale license, and the department may revoke any wholesale license when the licensee fails for a period of 45 days actively and in good faith to engage in the wholesale business and shall revoke any distilled spirits wholesaler's license held by any person who fails to comply with applicable provisions of Sections 23378, 23379, 23776, 23777 and 23778. Sale by a wholesale licensee to himself as a retail licensee is not the transaction of a bona fide wholesale business."

Section 23780 of the California Business and Professions Code provides:

> "Distilled spirits wholesaler's license or rectifier's license. No distilled spirits wholesaler's license or rectifier's license shall be isstied or renewed to any person who holds on deposit funds obtained from any retailer, which funds were obtained for the purpose of applying them, either in whole or in part, toward the payment of any future delivery of distilled spirits to the retailer."

Section 25750 of the California Business and Professions Code provides:

> "Rules and regulations. The department shall make and prescribe such reasonable rules as may be necessary or proper to carry out the purposes and intent of Section 22 of Article XX of the Constitution and to enable it to exercise the powers and perform the duties conferred upon it by that section or by this division, not inconsistent with any of the provisions of any statute of this State, including particularly the provisions of this division and the provisions of Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code."

Statement of the Case.

A. Summary of Material Facts.

Rule 28 was adopted by the Alcoholic Beverage Control Department of the State of California, providing:

> "No distilled spirits wholesaler's license shall be held by any person who does not meet the following qualifications in connection with his premises licensed as his principal place of business.

1. Maintains warehouse space either owned or leased by him or dedicated to his use in a public warehouse and such space is sufficient to store at one time either:

(a) A stock of distilled spirits equal to ten per cent or more of his annual case volume of distilled spirits sales to retailers within this State, or,

(b) A stock of distilled spirits whose cost of acquisition is one hundred thousand dollars or more.

2. Maintains at all times in his warehouse either owned or leased by him or in space dedicated to his use in a public warehouse a stock of distilled spirits consisting of either:

(a) Not less than five percent of his annual sales to retailers within this State, or,

(b) Whose cost of acquisition is one hundred thousand dollars or more.

The stock of distilled spirits herein required shall be: (a) owned by him, (b) not held on consignment, (c) not acquired pursuant to a prior agreement to sell it to a specific licensee or licensees.

3. Sells distilled spirits to retailers generally rather than a selected few retailers.

(a) A wholesaler who sells to twenty-five per cent of the retailers in the county wherein his wholesale licensed premises are located, or a wholesaler whose total volume of sales of distilled spirits to retailers during any twelve-month period consists of fifty per cent or more of individual sales in quantities of ten cases or less

shall be conclusively presumed to be selling to retailers generally" [Clk. Tr. p. 49, line 1, to p. 50, line 17].

The number of licensed retail premises for the sale of distilled spirits as of April 1, 1957 in the State of California and continuously thereafter is approximately 17,301, varying from 1 in the County of Alpine to 681 in the County of San Diego, 1148 in the County of Alameda, 2525 in the County of San Francisco, and 6000 in the County of Los Angeles [Clk. Tr. p. 50, line 19, to p. 52, line 19].

The plaintiffs duly caused to be filed, with the Alcoholic Beverage Control Department of California, a petition seeking an amendment to Rule 28, which was not adopted [Clk. Tr. p. 52, line 21, to p. 56, line 11].

Each of the plaintiffs, prior to the adoption of Rule 28, was the owner and holder of valid wholesale liquor licenses commonly known as (G) licenses, issued by the Alcoholic Beverage Control Department of California [Clk. Tr. p. 56, lines 12-17; p. 59, lines 18-23; p. 70, lines 11-19].

That each of the plaintiffs, during the twelve-month period from June 1, 1956, through May 31, 1957, being one year immediately prior to the effective date of the Rule, transacted distilled spirits business as a licensed wholesaler in substantial quantities and amounts, ranging from $449,000 to $1,500,000; and from 13,000 cases to 40,000 cases [Clk. Tr. p. 56, line 29; p. 57, line 14; p. 62, line 27; p. 63, line 10; p. 65, line 19; p. 66, line 1; p. 68, line 10; p. 68, line 25].

That the plaintiffs had retail customers during the said year ranging from 43 to 224 [Clk. Tr. p. 57, lines

29-30; p. 63, lines 25-26; p. 66, lines 16-17; p. 69, lines 8-9].

That the plaintiff, Duke Molner Wholesale Liquor Company, had cases of liquor on hand in warehouse on the first day of each month during the said year, ranging in quantities from 477 to 1532, and the value of said cases of liquor varied from $16,000 to $48,000; that five per cent of said plaintiff's annual case sales to retailers for said year was 924.55 cases [Clk. Tr. p. 58, line 12, to p. 59, line 10].

That the plaintiff, Jay L. Ambrose, had cases of liquor on hand in warehouse on the first day of each month during the said year, ranging in quantities from 16 to 1234, and the value of said cases of liquor varied from $500 to $44,000; that five per cent of said plaintiff's annual case sales to retailers for said year was 1260.90 cases [Clk. Tr. p. 64, line 7, to p. 65, line 6].

That the plaintiff, Stewart-Reynolds Co., had cases of liquor on hand in warehouse on the first day of each month during the said year, ranging in quantities from 1594 to 4921, and the value of said cases of liquor varied from $69,000 to $156,000; that five per cent of said plaintiff's annual case sales to retailers for said year was 2040.15 cases [Clk. Tr. p. 66, line 30, to p. 67, line 29].

That the plaintiff, Joseph M. Armelli, had cases of liquor on hand in warehouse on the first day of each month during the said year, ranging in quantities from 369 to 955, and the value of said cases of liquor varied from $10,000 to $26,000; that five per cent of said plaintiff's annual case sales to retailers for said year was 696.50 cases [Clk. Tr. p. 69, line 10, to p. 70, line 9].

At the request of the plaintiff, Leonard Siev, the action was dismissed as to him [Rep. Tr. p. 3, lines 8-15].

The plaintiff Duke Molner held wholesaler's licenses and did business in Los Angeles County as a wholesaler for eight years [Rep.Tr. p. 4, lines 12-23].

Molner advertised in Patterson's Guide, the industry's trade publication, indicating that he is in the wholesale business [Rep. Tr. p. 4, line 24, to p. 5, line 20; p. 93 of Exhibit 1; Rep. Tr. p. 6, lines 6-24].

Pamphlets or brochures were sent to off-sale package store licensees on occasions, advertising special items being offered by him [Rep. Tr. p. 7, lines 1-15].

Patterson's Guide [Ex. 1] is received by all wholesalers, distillers, off-sale and on-sale retail establishments in Southern California [Rep. Tr. p. 7, lines 18-20].

Before Rule 28 was adopted Molner was willing to sell his merchandise to any retailer who was willing to buy it, and the same applies at present [Rep. Tr. p. 7, line 23, to p. 8, line 2].

Molner has about $40,000 capital invested in his business, which includes a continuous bank loan of $25,000 [Rep. Tr. p. 8, lines 9-18].

Molner has three salesmen, an office where he has an order clerk and a bookkeeper, and a truck driver [Rep. Tr. p. 8, line 20, to p. 9, line 8].

Molner buys bulk whisky from brokers in Los Angeles and in the East. He also buys whisky from a distillery in Kentucky. The Kentucky distillery has allocated several labels for Molner's use in California. He and his salesmen solicit business from the general trade [Rep. Tr. p. 9, lines 9-20].

The usual method of receiving merchandise is to order a straight car of whisky, which is a minimum of 32,000 pounds. The whisky is delivered at the warehouse by a common carrier. It is unloaded, and if there are orders on file, invoices are issued and deliveries made with Molner's truck, or by common carriers [Rep. Tr. p. 11, lines 4-17].

The merchandise is never kept on the trucks which make the deliveries to the warehouse. After the whiskey is unloaded it is placed in the warehouse [Rep. Tr. p. 12, lines 6-18].

Molner has warehouse space that would accommodate ten per cent of his annual sales [Rep.Tr. p. 14, lines 2-6].

A "nationally advertised brand" is a brand that is controlled by the distiller who has the merchandise sold where it is legal to be sold, and where the distiller does exploitation and advertising through various media; illustrations are, "Sunnybrook," "Grandad" and "Canadian Club" [Rep. Tr. p. 14; lines 7-19].

A "private label" may be owned and controlled by the retailer, the wholesaler, or the distiller. When the private label is owned and controlled by the retailer it is made up for him and paid for by him. In the trade it is known as a private brand, owned and controlled by a retail account, and examples are "Certi-Brand" and "Old Pro" [Rep. Tr. p. 14, line 25, to p. 16, line 4].

Where the retailer owns the private label he can move it from one wholesaler to another by merely employing a new source of supply [Rep. Tr. p. 16, lines 17-22].

A "distiller's brand name reserved for a particular customer" is a brand name allocated to a chain organ-

ization which builds, exploits and advertises the brand. The retailer in this instance has the use of the brand as long as it continues to purchase it from the source of supply. An example of a private brand name owned by the distillery and reserved for a particular retailer is "Kentucky Supreme" [Rep. Tr. p. 17, line 14, to p. 18, line 9].

A "geographical reservation" for a retailer is protection given to an account within a geographical area, so the account can build and exploit the brand in its own community; an example would be "Bourbon Still," for San Diego County [Rep. Tr. p. 18, lines 10-20].

A private label owned and controlled by the wholesaler is one originated by the wholesaler and the labels are put on case goods of bulk whisky; that is, private labels are allocated to various retail accounts for their exclusive use [Rep. Tr. p. 18, line 23, to p. 19, line 6].

Molner has tried since the inception of his business to obtain nationally advertised brands, but was never successful. No reason was given by the distillers why he could not get them [Rep. Tr. p. 19, lines 7-21].

The nationally advertised brands are allocated to various wholesalers on an exclusive arrangement [Rep. Tr. p. 19, line 22, to p. 20, line 6].

Molner can and does meet the requirements of Provision 1(a) of Rule 28 calling for warehouse space sufficient to store a stock of distilled spirits equal to ten per cent of the annual case volume [Rep. Tr. p. 20, lines 8-19].

Molner does not meet the requirement of alternate Provision 1(b) of Rule 28, calling for a stock of dis-

tilled spirits whose cost is $100,000 or more, because his finances cannot handle it [Rep. Tr. p. 20, line 20, to p. 21, line 6].

Molner cannot meet the requirements of Provisions 2(a) and 2(b) of Rule 28, calling for the maintenance of stock consisting of not less than five per cent of the annual sales to retailers or whose cost is $100,000 or more, for the following reasons: five per cent is so excessive that it would necessitate freezing approximately $50,000 of distilled spirits at all times; he would need stock in addition to that amount to take care of the requirements for the current month; it would require more money than he has [Rep. Tr. p. 21, line 7, to p. 22, line 23].

Molner meets the requirement of Provision 2 that the stock be owned by him and not held on consignment [Rep. Tr. p. 22, line 24, to p. 23, line 9].

Molner does not understand Provision 2 requiring that the stock be "not acquired pursuant to a prior agreement to sell it to a specific licensee." He does obtain orders from retail customers before placing an order with a distillery. It is the general practice among all wholesalers [Rep. Tr. p. 23, line 10, to p. 24, line 3].

It is necessary to order whisky to have enough on hand for smaller accounts and orders are then placed to take care of the large accounts as they are called in [Rep. Tr. p. 24, line 25, to p. 25, line 11].

He does not have any arrangement whereby whisky is purchased from a distillery with the understanding that the distillery had made some arrangement with the retailer that the merchandise was to go to the particular retailer [Rep. Tr. p. 25, lines 12-17].

Molner does not sell distilled spirits to twenty-five per cent of the retailers in Los Angeles County (a requirement for a conclusive presumption that the licensee is selling to retailers generally), because he does not have the sales force, the financial background, or facilities to extend credit that might be required if he were selling to 1500 retailers [Rep. Tr. p. 26, lines 7-19].

Molner cannot meet the requirement of Provision 3 that the total volume of sales shall consist of fifty per cent or more of individual sales in quantities of ten cases or less (an alternate method used to conclusively presume that the licensee is selling to retailers generally), because of limited capacity, limited salesmen and limited credit. In order to meet this conclusive presumption he would require at least fifteen salesmen, eight or nine trucks, five or six people in the office, and additional branches [Rep. Tr. p. 26, line 20, to p. 27, line 7].

The type of wholesalers who do service the type of accounts called for in Provision 3 of Rule 28 are those who handle the major advertised brands of the large distiller, and who have branches to service the accounts [Rep. Tr. p. 28, lines 8-13].

At the time the license was issued to Molner, and continuously up until June 1, 1957, there was no requirement such as contained in Rule 28 in order for him to either obtain the license or maintain it. He opposed the adoption of Rule 28 [Rep. Tr. p. 28, lines 14-21].

Plaintiff Jay L. Ambrose has held a wholesaler's license in Los Angeles for four years [Rep. Tr. p. 62, line 11, to p. 63, line 4].

Ambrose's testimony, in substance and effect, would be the same as that of Mr. Molner on the subject of

advertising and methods employed by him in an endeavor to obtain business from retailers [Rep. Tr. p. 63, lines 5-13].

He has four sales people, including himself [Rep. Tr. p. 63, lines 18-23].

Ambrose advertises in Patterson's Guide [P. 64 of Ex. 1].

Ambrose is willing to sell to any retailer who is willing to buy the merchandise, assuming he has either sufficient cash or credit [Rep. Tr. p. 63, line 24, to p. 64, line 1].

Ambrose has about $40,000 capital invested in his Los Angeles business [Rep. Tr. p. 64, lines 2-4].

Ambrose's method in purchasing is to buy from two small independent distillers in Kentucky [Rep. Tr. p. 64, line 20, to p. 65, line 5].

Ambrose's method of sales is pretty much the same as Mr. Molner described [Rep. Tr. p. 65, lines 18-21].

It is better business to get an order in advance from retailers before buying from the distiller [Rep. Tr. p. 65, line 22, to p. 66, line 1].

Ambrose's merchandise is delivered by rail cars which come on his own property and on his own siding. Sometimes shipments are made from the rail car to avoid handling the merchandise twice [Rep. Tr. p. 22, lines 10-16].

Ambrose did wholesale business in Colorado and handled nationally advertised brands there. When he came to Los Angeles he was never able to get any of the nationally advertised brands that he had in Colorado. He tried to get nationally advertised brands and was only

able to get one about a year ago [Rep. Tr. p. 66, line 17, to p. 67, line 18].

Ambrose is able to meet the requirement of Provision 1(a) of Rule 28 calling for enough warehouse space to accommodate ten per cent of his annual sales [Rep. Tr. p. 67, lines 19-23].

Ambrose cannot meet the requirements of Provision 2(a) calling for the maintenance in warehouse of stock equivalent to five per cent of annual sales, because it would require maintaining a stock of $40,000 to $45,000. He would have to carry an inventory of $100,000 to maintain a $50,000 average daily inventory, as one-half of it would have to be kept on the floor, which could not be sold [Rep. Tr. p. 68, line 13, to p. 69, line 13].

Ambrose owns all of the merchandise he has on hand and none of it is held on consignment. None of it was acquired pursuant to any prior agreement between any distillery and retailer [Rep. Tr. p. 69, lines 14-22].

Ambrose is willing to sell to retailers generally, and does [Rep. Tr. p. 70, lines 6-9].

Ambrose cannot sell to 1500 accounts in Los Angeles County because he does not have distiller support. Big distillers extend long-term credits. They have big bottling plants in California to supply their customer. It takes Ambrose two and a half to three weeks to get a carload of whiskey from Kentucky. The distributor for a large wholesaler like Schenley can get whisky overnight [Rep. Tr. p. 70, line 20, to p. 71, line 11].

Ambrose does not have on hand at any time a stock whose cost of acquisition is $100,000 or more, because he does not have the money [Rep. Tr. p. 72, lines 3-7].

Ambrose has not sold fifty per cent of his sales in quantities of ten cases or less, because he does not have the physical plant, the finances, the distillers' support, or the items that small retailers want. The small retailers want nationally advertised brands, and Ambrose does not have them [Rep. Tr. p. 72, lines 8-19].

When Ambrose obtained his wholesaler's license, and up until June 1, 1957, he was never required to meet any of the provisions set forth in Rule 28. He opposed the adoption of the Rule [Rep. Tr. p. 73, lines 4-12].

Leonard Siev, whose action was dismissed at his request, sold his business as of April 20, 1958, because of Rule 28 [Rep. Tr. p. 82, lines 9-26].

Siev felt that if Rule 28 became a reality he could not exist for the following reasons:

1. The financial requirement as to the amount of inventory he would be required to carry.

2. He could not cover the required number of retail accounts.

3. He was unable to secure a major brand for sale [Rep. Tr. p. 83, lines 2-12].

At the time he sold his business he had $35,000 capital invested and had held a wholesaler's license since 1951 [Rep. Tr. p. 83, lines 13-18].

His testimony would be basically the same in substance and effect as Mr. Molner's and Mr. Ambrose's insofar as his method of doing business was concerned, as well as his efforts to sell to retailers [Rep. Tr. p. 83, lines 19-26].

He advertised in Patterson's Guide [p. 18 of Ex. 1].

He opposed the adoption of Rule 28 [Rep. Tr. p. 84, line 24, to p. 85, line 1].

Plaintiff Joseph M. Armelli has held a rectifier's license, which gives him the privilege to wholesale, since 1948, and his place of business is in Los Angeles [Rep. Tr. p. 98, line 18, to p. 99, line 13].

Armelli cannot comply with Rule 28 because he cannot possibly cover the amount of licenses required under the Rule, as his merchandise is not advertised [Rep. Tr. p. 100, lines 6-16].

Armelli cannot keep five per cent of his sales on hand at all times because the only way he can operate his business is by receiving orders and preparing the merchandise to fill the orders; it is necessary for him to pre-sell some of his merchandise before it is made up for delivery [Rep. Tr. p. 100, line 17, to p. 101, line 9].

As a rectifier he sells to wholesalers [Rep. Tr. p. 99, lines 24-25].

Armelli has $30,000 invested in his business, in addition to the building owned by him [Rep. Tr. p. 101, lines 12-18].

Philip Marshall, president of the plaintiff Stewart-Reynolds Co., has been in the wholesale liquor business for twenty years [Rep. Tr. p. 104, lines 9-24].

He kept a full-page listing in Patterson's Guide at all times [Rep. Tr. p. 105, lines 21-22; p. 122 of Ex. 1].

Marshall has practically the same kind of operation in trying to get business from retailers as Mr. Molner and Mr. Ambrose [Rep. Tr. p. 106, lines 1-4].

He has about $250,000 capital invested, of which $65,000 is his own, and the balance consists of loans from banks and money owed for merchandise [Rep. Tr. p. 106, lines 5-12].

Marshall has two salesmen, in addition to himself, who call on retail trade generally [Rep. Tr. p. 106, lines 13-19].

Marshall has tried for ten years to get nationally advertised brands, and was never able to do so [Rep. Tr. p. 106, line 20, to p. 107, line 9].

Marshall has available all the warehouse space that might be needed [Rep. Tr. p. 107, line 25, to p. 108, line 11].

Marshall does not maintain a stock of $100,000 or more because his credit is not that good and he has items that have to be pushed out real fast due to lack of money [Rep. Tr. p. 105, lines 12-19].

Though he has $250,000 invested in his business, he cannot maintain a stock on hand of $100,000 because the $100,000 stock would be frozen and he could not use the other $150,000 for the purpose of having an operating stock, as accounts receivable run into a lot of money [Rep. Tr. p. 109, lines 2-20].

He does not have enough money to maintain a stock of five per cent of his annual case sales [Rep. Tr. p. 109, line 21, to p. 110, line 10].

All of the merchandise is owned by the Stewart-Reynolds Co. and none of it is held on consignment [Rep. Tr. p. 110, lines 11-18].

Marshall takes an order for merchandise and then buys from the distiller to fill it. He usually buys a few hundred cases in addition, to keep an inventory [Rep. Tr. p. 110, line 23, to p. 111, line 3].

Marshall is willing to sell to any retailer who has the cash or credit [Rep. Tr. p. 112, lines 20-25].

Marshall does not sell to twenty-five per cent of the retailers in Los Angeles County but is willing to if he had sufficient merchandise. Most of the nationally advertised brands are on an exclusive basis with the larger wholesalers, and the nationally advertised brands will not be sold to him [Rep. Tr. p. 112, line 26, to p. 113, line 16].

He cannot sell 50% of his sales in quantities of 10 cases or less because the small accounts are looking for nationally advertised brands [Rep. Tr. p. 113, line 17, to p. 114, line 1].

He opposed the adoption of Rule 28 [Rep. Tr. p. 114, lines 13-15].

Marshall held a conversation with Russell Munro, Director of the Alcoholic Beverage Control Department around April 29, 1957, in the presence of Assistant Director Malcolm Harris and Joseph Ray, who is now out of business [Rep. Tr. p. 114, line 16, to p. 115, line 11].

The conversation concerned Rule 28. Mr. Munro was told that Rule 28 would be a hardship. Mr. Munro stated if there was anything he could do he would be glad to do it. Mr. Munro said he thought relief should be given [Rep. Tr. p. 115, line 12, to p. 116, line 16].

J. Albert Hutchinson is an attorney for an association of wholesalers known as the California Beverage Distributors Association [Rep. Tr. p. 90, lines 18-26].

He proposed a Rule 28 in behalf of the membership, but would not want to say how much is similar to the present Rule 28 [Rep. Tr. p. 91, lines 3-8].

During the trial Mr. Hutchinson sat at the counsel table next to the Deputy Attorney General, and conferred with him during the presentation of the case.

He is not one of the attorneys in the case, and is not connected with the Attorney General's office [Rep. Tr. p. 94, line 16, to p. 95, line 2].

Curtis H. Palmer is a lawyer who represents the wholesale association in Southern California called "The Beverage Wholesale Association of Southern California." One of the members is the Alfred Hart Distributing Company. Mr. Hart is the president of the City National Bank [Rep. Tr. p. 95, line 21, to p. 96, line 22].

There is no substantial difference between Rule 28 as adopted by the Director of the Department of Alcoholic Beverage Control and the one proposed by the Association [Rep. Tr. p. 97, lines 1-16].

Mr. Palmer conferred with Mr. Belasco, the Deputy Attorney General, though he is not one of the attorneys in the case and not connected with the Attorney General's office [Rep. Tr. p. 97, line 17, to p. 98, line 4].

Mr. Palmer is the president of the Glencoe Distributing Company and the major stockholder is Alfred Hart [Rep. Tr. p. 169, lines 14-21].

Mr. Hart is a principal stockholder of the Hart Distributing Company, a wholesaler, as well as a majority stockholder of Glencoe Distilling Company, and the Hart Distributing Company has an exclusive arrangement in Los Angeles County for handling "Glencoe" [Rep. Tr. p. 170, lines 2-13].

B. Federal Questions Previously Raised.

Plaintiffs, in Paragraph IV of their Third Amended Complaint, pled that Section 2 of Rule 28 "requiring a wholesaler to maintain at all times a stock of distilled spirits equal to not less than 5% of his annual sales

to retailers within California, or whose cost of acquisition is $100,000 or more, is arbitrary, discriminatory, punitive, and amounts to unequal enforcement of the law, in violation of the Fourteenth Amendment to the Constitution of the United States, and is a denial of due process of law" [Clk. Tr. p. 4, lines 10-17].

Plaintiffs, in Paragraph IV of their Third Amended Complaint, pled that if defendants were correct in their interpretation of Section 2 of Rule 28 that "a wholesaler cannot obtain an order from a retailer before placing an order with a distiller or rectifier for a quantity of distilled spirits to meet the order of said retailer", then "said provision is arbitrary, discriminatory, punitive, and amounts to unequal enforcement of the law, in violation of the Fourteenth Amendment to the Constitution of the United States, and a denial of due process of law, in that it takes away from the plaintiff the right of contract and prohibits plaintiff from engaging in lawful interstate commerce" [Clk. Tr. p. 4, line 21, to p. 5, line 10].

Plaintiffs, in Paragraph IV of their Third Amended Complaint, pled that the portion of Section 3 of Rule 28 which provides "sells distilled spirits to retailers generally rather than a selected few retailers" was so uncertain and ambiguous as to make it impossible to determine what is meant by "retailers generally" and what is meant by "rather than a selected few retailers" and amounts to a denial of due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States [Clk. Tr. p. 6, lines 21-28].

Plaintiffs, in the prayer of their Third Amended Complaint, asked "that the Court declare the rights of the plaintiffs and defendants pursuant to Rule 28

described in this Third Amended Complaint, and that the Court declare that said Rule 28 is arbitrary, discriminatory, punitive, and that it would bring about unequal enforcement of the law, and that it is unconstitutional and in violation of due process and the Fourteenth Amendment to the Constitution of the United States; that the Court further declare that the defendants have no right to enforce the said Rule 28; that the same is unconstitutional and, therefore, cannot be enforced as against any of the plaintiffs named herein" [Clk. Tr. p. 28, lines 11-22].

That in the pre-trial conference statement there is set forth plaintiffs' statement of contentions, and included therein was the contention that "Rule 28 is arbitrary, discriminatory, punitive, and amounts to unequal enforcement of the law, in violation of the Fourteenth Amendment to the Constitution of the United States, and is a denial of due process of law; and endeavors to provide how much business a person must do in order to qualify as a wholesaler" [Clk. Tr. p. 46, line 30 to p. 47, line 2].

The trial Court, in its Findings of Fact, held "it is not true that Section 2 of said Rule is arbitrary, discriminatory, punitive, amounts to unequal enforcement of the law, or is a denial of due process of law" [Clk. Tr. p. 93, lines 3-5].

The trial Court, in its Conclusions of Law, found "that Rule 28 of the Department of Alcoholic Beverage Control is not in violation of the Fourteenth Amendment to the Constitution, does not deprive any plaintiff of due process of law or the right to contract or to engage in interstate commerce" [Clk. Tr. p. 96, lines 5-8].

The trial Court, in its Judgment, held "Rule 28 of the Department of Alcoholic Beverage Control of California is not arbitrary, discriminatory or punitive; is not violative of due process of law or the Fourteenth Amendment to the Constitution" [Clk. Tr. p. 98, line 31, to p. 99, line 2].

Appellants, in their Opening Brief, contended that the requirements of Sections 2(a) and 2(b) of Rule 28, calling for the maintenance of stock consisting of not less than 5% of the annual sales to retailers or whose cost is $100,000 or more, could not be met, as 5% is so excessive that it would necessitate freezing too great an amount of money in distilled spirits at all times, and the plaintiffs would require additional stock to take care of requirements for the current month; it was further pointed out that appellants were unable to obtain nationaly advertised brands, and that the nationally advertised brands were allocated to various wholesalers on an exclusive arrangement. Appellants further pointed out that they could not sell distilled spirits to 25% of the retailers in Los Angeles County, nor sell 50% of their sales in quantities of ten cases or less because of limited sales force, financial background and limited credit resources and, therefore, could not meet the conclusive presumption of Section 3 of Rule 28 (App. Op. Br., pp. 8, 9, 10, 11, 12, 13, 15 and 16).

Appellants, in their Opening Brief, pointed out that large wholesalers holding franchises for nationally advertised brands have no difficulty in meeting the requirements of Rule 28, but the small wholesalers who are frozen out from handling nationally advertised brands cannot comply with the Rule; that the Rule penalizes the small wholesaler, for it requires him to

have an investment of at least a quarter of a million dollars; that the Rule would destroy the handling of house brands or private labels by small wholesalers, and that the Rule does not define what constitutes sales to retailers generally, called for in Section 3 of Rule 28, but only provides what shall be conclusively presumed to be a sale to retailers generally (App. Op. Br. pp. 21, 22, 23, 24 and 25).

Appellants, in their Closing Brief, pointed out that the Rule protects the wholesaler who can buy nationally advertised brands and penalizes the wholesaler who can not (App. Cl. Br. p. 4).

Appellants, in their Petition for Rehearing, pointed out that the District Court of Appeal did not determine whether presold merchandise shall be included in computing the total sales of the licensees in determining whether the licensees had on hand in the warehouse 5% of their total sales (Pet. for Rehearing, p. 2).

Appellants, in their Petition for Rehearing, also pointed out that the District Court of Appeal did not determine what constitutes "sales to retailers generally", called for in Section 3 of Rule 28 (Pet. for Rehearing, p. 2).

Appellants, in their Petition for Hearing in the Supreme Court of the State of California, urged the same points as presented to the District Court of Appeal insofar as the constitutional questions are concerned (Pet. for Hearing, pp. 8, 9, 10, 11, 12, 14, 15, 16, 18, 19, 23, 24, 25, 27).

Appellants contended in their Petition for Hearing in the Supreme Court of the State of California that the Rule 28 was contrary to the provisions of the Fourteenth Amendment of the United States Constitution (Pet. for Hearing, p. 28).

ARGUMENT.

Rule 28 Is Invalid.

Rule 28 provides in effect:

1. The wholesaler must have a warehouse of his own, or space in a public warehouse, to accommodate ten per cent of his annual business, or $100,000.00 of stock.

2. The wholesaler must have an inventory of five per cent of his annual sales, or $100,000.00 of stock in his own or public warehouse. This must consist of merchandise owned by him; none of it must be on consignment; and none must be acquired pursuant to a prior agreement to sell to a specific licensee.

3. The wholesaler must sell to retailers generally. It is conclusively presumed that the wholesaler is selling to retailers generally if he sells to twenty-five per cent of the retailers in the County, or if fifty per cent of the sales is in quantities of 10 cases or less.

A ministerial officer, under the guise of a rule or regulation, may not vary the terms or condition of a legislative enactment.

People v. Harter Packing Co., 100 A. C. A. 497, 325 P. 2d 519.

The legislature may not delegate authority to a Board or Commission to adopt rules which abridge, enlarge, extend or modify the statute creating the right. The power conferred upon the legislature to make laws cannot be delegated to any other authority.

Blatz Brewing Co. v. Collins, 69 Cal. App. 2d 639; 160 P. 2d 37.

A rule of the State Board of Equalization requiring foreign beer manufacturers to obtain certificates of compliance granted only on certain conditions prescribed by the Board and prohibiting local dealers from purchasing from foreign manufacturers not having such certificates was void.

Blatz Brewing Co. v. Collins, 69 Cal. App. 2d 639; 160 P. 2d 37.

The legislature may delegate authority only after declaring a policy and fixing a primary standard.

American Distilling Co. v. State Board of Equalization, 55 Cal. App. 2d 799; 131 P. 2d 609; *Nelson v. Dean*, 27 Cal. 2d 873; 168 P. 2d 16.

The rules adopted must not be arbitrary or discriminatory.

Leftridge v. Sacramento, 59 Cal. App. 2d 516, 139 P. 2d 112.

Distilled spirits wholesaler's license. A distilled spirits wholesaler's license shall not be held by any person unless *at all times* throughout the license year he has on his wholesale premises a *reasonable stock* of distilled spirits, *as determined by the department, for which he has fully paid lawful money or its equivalent.* (Italics ours.)

Business and Professions Code, Sec. 23778.

It should be noted that it is customary for merchants, whether they be wholesalers or retailers, to reduce their inventory on hand as of the first Monday in March of each year. That is the date for determining the assessed valuation of property for the purpose of county taxation.

Conclusion of Law II [Clk. Tr. p. 90] states that the Rule is not in violation of any provision of the Constitution of California, and is authorized by Section 23778 of the Business and Professions Code of California. However, Section 23778 of the Business and Professions Code provides that the stock required to be held on hand by a wholesaler is a reasonable amount as required by the Department *for which he has fully paid lawful money or its equivalent* (italics ours), whereas the Rule lays down additional conditions pertaining to what constitutes a reasonable stock.

Wholesale license. No wholesale license *shall be issued* to any person who does not in good faith actually carry on or intend to carry on a *bona fide wholesale business* by sale to retail licensees of the alcoholic beverage designated in the wholesale license, and the department *may revoke* any wholesale license *when the licensee fails* for a period of 45 days actively and in good faith *to engage in the wholesale business* and shall revoke any distilled spirits wholesaler's license held by any person who fails to comply with applicable provisions of Sections 23378, 23379, 23776, 23777, and 23778. Sale by a wholesale licensee to himself as a retail licensee is not the transaction of a bona fide wholesale business. (Italics ours.)

Business and Professions Code, Sec. 23779.

The Rule endeavors to lay down iron-clad standards to be followed by the Department in determining whether or not the licensee is a bona fide wholesaler. Appellants contend that the facts of each case should be the criteria factor in determining whether an individual is a bona fide wholesaler. The Department should have

the ability and freedom to deal with the facts of each case.

"Bona fide" is defined in Webster's New International Dictionary (2d Ed.) as "in or with good faith: without fraud or deceit; genuine." This definition was adopted as controlling by the California Supreme Court, in *Covert v. State Board of Equalization* (1946), 29 Cal. 2d 125, in determining whether a place was a "bona fide public eating place," as required by Section 22 of Article XX of the Constitution.

Section 23021 of the Business and Professions Code defines a "wholesaler" as "every person other than a manufacturer, wine grower, or rectifier who is engaged in business as a jobber or wholesale merchant, dealing in alcoholic beverages." Webster's New International Dictionary (2d Ed.) defines a "jobber" as "one who buys goods from importers or producers and sells to other dealers; a middleman," and defines "wholesale" as the "sale of goods by the piece or in large quantity; distinguished from *retail*" and the adjective form thereof as "of, pertaining to, or engaged in, wholesale trade or business; selling to retailers or jobbers rather than consumers."

Rule 28 endeavors to establish additional requirements as to what constitutes a wholesaler than is provided by Section 23021 of the Business and Professions Code.

An administrative agency must confine itself to reasonable interpretation in adopting regulations for administration of its governing statutes, and if it goes beyond that, the regulations are invalid as an invasion of the legislative area.

An administrative officer may not make a rule or

regulation that alters or enlarges the term of a legislative enactment.

Pearson v. State Social Welfare Board, 175 A. C. A. 833, 346 P. 2d 872.

The large wholesalers holding franchises from nationally advertised brands have no difficulty in meeting the requirements of Rule 28. The small wholesalers who are frozen out from handling nationally advertised brands cannot comply with the Rule.

The proper test that should be applied in determining if a licensee is a bona fide wholesaler is that the Department should decide each case on its merits, taking into consideration all of the facts pertaining to the method of the business operations and whether he is holding himself out as a wholesaler to retailers.

In addition to normally small wholesalers, there would be firms who specialize in particular items who could not meet the standards of the rule. And yet no one would deny that they are legitimate wholesalers.

In short, the test of a bona fide wholesaler should not be how big he is, or whether he handles many items, or whether he sells to 25% of the trade or whether he sells in lots of less than 10 cases. The test should be whether he holds himself out legitimately as a wholesaler and is willing to sell the products that he handles to retailers generally.

It is not necessary to have a rule setting forth how much stock should be on hand to determine if a man is a legitimate wholesaler. The law of supply and demand will require the wholesaler to have sufficient stock on hand to meet the requirements of his customers; and if he does not have sufficient stock on hand he

will not be a wholesaler very long—he will be out of business.

The rule penalizes the small wholesaler, for it requires him to have an investment of at least a quarter of a million dollars if he is going to meet the requirements of the rule. This takes into account the amount of stock to be held on hand as well as credits extended to his customers.

If the rule is to be upheld, then the Department should also adopt a rule requiring all distillers to sell to all wholesalers who desire to purchase their products. This would be based on the Kansas law.

But the proponents of Rule 28 would never favor such a proposal. They want their exclusive franchises. They want to be the only ones to handle the major brands. They want to continue their monopolistic practices.

The rule would destroy the handling of house brands or private labels by small wholesalers. The wholesaler handling a nationally advertised name brand can estimate his sales month by month on the basis of what his regular customers are ordering; but the wholesaler who is handling a house brand or private label is not permitted to take into consideration the amount of liquor that will be purchased by his customer. This reacts in favor of the major wholesaler, because the large wholesaler in addition to handling certain house brands has enough other business through his exclusive franchises to qualify under the rule.

If the Department is endeavoring to reach the person who is really not a wholesaler but a broker, and operates through the method of "drop shipments", the rule is not needed. Even the proponents of the rule ad-

mit that. For such an operation is illegal under the law today, and the rule would not change anything.

The conclusive presumption of the rule is arbitrary, for it punishes initiative and the expansion of business. A wholesaler would have to limit 50% of his sales to 10 cases or less. The effect of limiting sales to under 10 cases is to increase the cost of doing business. It would be just like telling a gasoline station that a percentage of its sales must be under two gallons to a customer.

The Court, in its Conclusions of Law V [Clk. Tr. p. 96, line 27, to p. 97, line 2] states that the rule is reasonable and not discriminatory or punitive in prescribing that the minimum quantity of stock required to be maintained by a wholesale licensee shall be in addition to any distilled spirits acquired pursuant to a prior agreement to sell the same to a specific licensee.

The Court in its Opinion (Appendix p. 11) holds that the section "neither permits nor prohibits advance sales, it merely provides that pre-sold merchandise shall not be counted in the stock required to be kept on hand in the warehouse."

However, the Court does not determine whether such sales are to be included in computing the total sales of the licensees, against which the 5% is to be figured.

If the 5% of annual sales is computed on the total sales, including the sales of liquor acquired pursuant to prior agreement to sell to a specific licensee, and such "pre-sold" merchandise is not to be counted in the stock required to be kept on hand, then the rule would be unreasonable and discriminatory. In this particular, the Rule is ambiguous, vague and indefinite.

To be consistent, if the "pre-sold" merchandise is to be excluded in determining the amount of stock on hand, then the "presales" should be excluded in determining the total sales of the licensees.

The rule does not disclose whether the 5% provision is to be computed on the total sales or on the sales excluding those pursuant to a prior agreement to sell to a specific license.

As a result of this ambiguity, vagueness and indefiniteness, the rule is void. The licensees are entitled to know in advance on what basis the 5% is to be computed.

The provision requiring stock on hand equal to 5% of annual sales or $100,000.00 of stock discriminates against the specialty houses who have an extremely limited market for their products. This applies particularly to those firms who deal almost exclusively in imports.

A new wholesaler could not qualify unless he had $100,000.00 of stock on hand when he opened up his business. This is true because he could not have a stock equaling 5% of his annual sales, since there would be no way of determining it. He is just beginning business. The rule in effect would state that if you do not have at least $100,000.00 you cannot go into the wholesale business. It should be kept in mind that the new wholesaler, in addition to having a $100,000.00 stock on hand, would have to have additional capital to take care of the other items involved in establishing and maintaining a business. This is contrary to every concept of the American system of free enterprise and initiative.

A gentleman's tailor makes slacks one pair at a time for his selected and small clientele. He does not know

exactly when and to whom his next sale will be. It would be ridiculous to require him to carry an inventory proportionately equal to that maintained by the May Company. Both the tailor and the May Company are retailers; the absurdity of inventory requirements will also be true if applied to an exclusive clothing manufacturer with a limited number of customers as compared with the manufacturer who sells his line to large store operations.

In liquor, as in clothing, the amount of inventory which a man carries and which he should be required to carry in order to conduct business properly is and should be dependent upon his own particular business and not upon a fixed mathematical formula or ratio. Not all wholesalers of liquor and other products have wide distribution.

Section 23779 of the Business and Professions Code is sufficient to enable the Department to proceed against any licensee who does not in good faith actually carry on a bona fide wholesale business. As long as the licensee is ready, willing and able to sell his stock of merchandise or merchandise which he can obtain from the distiller, to retailers, he should not be bound by arbitrary, unreasonable conditions.

To permit Rule 28 to remain as presently constituted would mean that the government of California is a party to maintaining a monopoly in the hands of large wholesalers. This is contrary to our philosophy of government.

The rule does not define what constitutes sales to retailers generally, which is called for in Point 3 of the rule. While it is true a conclusive presumption is set forth, nevertheless, a wholesaler would be in busi-

ness at his peril, for he has no way of knowing in advance what is required of him insofar as the rule is concerned. A wholesaler should be one who buys from a manufacturer or distiller and sells to retailers.

The Rule in that particular is unreasonable. It makes it mandatory for a wholesaler to sell to retailers generally, without defining it, instead of requiring that the wholesaler hold himself out as willing to sell to retailers generally. A licensee should not be excluded as a wholesaler merely because he does not sell to retailers generally as long as he is willing to do so and holds himself out as willing to do so.

Rule 28 in an example of endeavoring to legislate by rule.

The rule is not required, for Section 23779 of the Business and Professions Code prevents the sale by a wholesale licensee to himself as a retail licensee. Section 23780 of the Business and Professions Code prevents the wholesaler from holding funds of a retailer if the funds were obtained for the purpose of applying them either in whole or in part toward the payment of any future delivery to the retailer. These are additional illustrations showing that there is ample law to regulate the wholesaler without sanctioning a rule for which no legislative standard has been provided.

Rule 28 for the foregoing reasons is contrary to the provisions of the Fourteenth Amendment to the United States Constitution.

Conclusion.

Wherefore, your petitioners pray that this Court issue a Writ of Certiorari to the District Court of Appeal of the State of California in and for the Second Appellate District, and that the judgment of said Court be reversed to the end that the California Alcoholic Beverage Control Department and its Director be enjoined from enforcing said Rule 28, and for such other and further relief as to the Court may seem just.

Respectfully submitted,

MURRAY M. CHOTINER,
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JEROME L. EHRLICH,

By MURRAY M. CHOTINER,
Attorneys for Petitioners.

EXHIBIT "A."

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

Duke Molner Wholesale Liquor Co., Inc., a corporation; Leonard Siev, dba Pacific Liquor Distributors; Joseph M. Armelli, dba Associated Liquor Products Co.; World Over Importers, Inc., a corporation; Stewart-Reynolds Co., Inc., a corporation; and Jay L. Ambrose, dba Kentucky Wholesale Co., Plaintiffs, vs. Thomas W. Martin, Director, Department of Alcoholic Beverage Control, State of California; and Department of Alcoholic Beverage Control, State of California, Defendants and Respondents. Duke Molner Wholesale Liquor Co., Inc., a corporation; Joseph M. Armelli dba Associated Liquor Products Co.; Stewart-Reynolds Co., Inc., a corporation and Jay L. Ambrose, dba Kentucky Wholesale Co., Appellants. Civil No. 23768.

Filed May 16, 1960.

Appeal from a judgment of the Superior Court of Los Angeles County, Honorable Ellsworth Meyer, Judge.

Murray M. Chotiner, Russell E. Parsons and Jerome L. Ehrlich, for Appellants.

Stanley Mosk, Attorney General; Edward M. Belasco, Deputy Attorney General, for Respondents.

This is an appeal from a judgment which in effect declared a rule of the Department of Alcoholic Beverage Control to be proper and constitutional.

In the third amended complaint for declaratory relief and injunction plaintiffs sought a declaration that Rule

28 (the rule in dispute) was unconstitutional and could not be enforced against the plaintiffs. A statement was filed by the parties pursuant to a pretrial conference order which substantially set forth the facts and the issues to be determined. That statement set forth the nature of the case, the plaintiffs' contentions, the defendants' contentions and a copy of Rule 28 which reads as follows:

"Rule 28. No distilled spirits wholesaler's license shall be held by any person who does not meet the following qualifications in connection with his premises licensed as his principal place of business:

"1. Maintains warehouse space either owned or leased by him or dedicated to his use in a public warehouse and such space is sufficient to store at one time either

"(a) A stock of distilled spirits equal to 10 percent or more of his annual case volume of distilled spirits sales to retailers within this State, or,

"(b) A stock of distilled spirits whose cost of acquisition is one hundred thousand dollars or more.

"2. Maintains at all times in his warehouse either owned or leased by him or in space dedicated to his use in a public warehouse a stock of distilled spirits consisting of either

"(a) Not less than 5 percent of his annual sales to retailers within this State, or,

"(b) Whose cost of acquisition is one hundred thousand dollars or more.

"The stock of distilled spirits herein required shall be: (a) owned by him, (b) not held on consignment,

(c) not acquired pursuant to a prior agreement to sell it to a specific licensee or licensees.

"3. Sells distilled spirits to retailers generally rather than a selected few retailers.

"(a) A wholesaler who sells to 25 per cent of the retailers in the county wherein his wholesale licensed premises are located, or a wholesaler whose total volume of sales of distilled spirits to retailers during any 12-month period consists of 50 percent or more of individual sales in quantities of 10 cases or less shall be conclusively presumed to be selling to retailers generally." This rule became effective June 1, 1957.

The court made a comprehensive "memorandum of decision" which has been helpful and with which this Court agrees. There was little or no dispute about the facts at the trial. The court made findings of fact, conclusions of law and awarded a judgment for the respondents.

A résumé of the facts is as follows:

The four appellants, Duke Molner Wholesale Liquor Company, Inc., a corporation; Joseph M. Armelli, doing business as Associated Liquor Products Company; Stewart-Reynolds Company, Inc., a corporation and Jay L. Ambrose, doing business as Kentucky Wholesale Company (hereinafter referred to respectively as Molner, Ambrose, Stewart and Armelli), were each engaged in what was termed the wholesale liquor business in California and were so licensed by the Department of Alcoholic Beverage Control (hereinafter referred to as Department).

The appellants generally obtained their bourbon whiskey from distilleries in Kentucky by way of trucks

or railroad cars, their gin and vodka from Boston by way of steamships and some items of distilled spirits from Fresno and Sacramento. The shipments from the Eastern states required two weeks or more before delivery in Los Angeles.

In the first instance when Rule 28 was proposed the appellants appeared and opposed the adoption of such rule. After the rule was adopted this action was instituted and the relief heretofore mentioned was sought.

In the case of Molner the evidence disclosed that Molner had been licensed for eight years, that its place of business was on the sixth floor of Bekins Van and Storage Building on North Highland in Los Angeles where it had allotted to it 3000 square feet of storage with more available if needed, that there was a capital investment of $40,000.00 in the business and in addition to Duke Molner, there were three salesmen, an order clerk, bookkeeper and a truck driver. Bulk whiskey was purchased from brokers in Los Angeles and in the East. About 60 percent of the liquor Molner kept on hand was bourbon whiskey and the remaining 40 percent was distilled spirits received from some other source. Molner sold about 70 percent of its distilled spirits to chain stores and discount houses and 30 per cent to small independent stores. About 12 of its customers accounted for 70 percent of its business. Liquor was sold to all retailers who were financially accountable and who placed their orders with it. Part of Molner's business consisted of handling pre-sold merchandise, that is, it would secure an order from a retail customer before placing its own order with the distillery or rectifier. Such pre-sold merchandise was taken from its warehouse as soon as practicable. From

June 1, 1956 to May 31, 1957 Molner sold 18,491 cases of distilled spirits to retailers of the value of $648,117.17. Five percent of the annual case sales was 924.55 cases and five percent of such sales in dollars was $32,405.86. Molner had on hand in the warehouse on the first day of each month during said year quantities ranging from 477 cases in June, 1956 to 1532 cases in February of 1957 and the value thereof varied from $16,334.96 to $48,001.45.

As to Armelli, he was a rectifier of distilled spirits and had been in such business since 1933 and was licensed as a wholesaler since 1948. He sold to retailers and wholesalers and excluding the building he occupied his investment in the business was about $30,000.00. He sometimes took orders in advance and then prepared the merchandise to fill such orders. From June 1, 1956 to May 31, 1957 he sold 13,930 cases of distilled spirits valued at $439,069.05 to retailers. Five per cent of such sales in cases was 696.50. He had on hand in his warehouse on the first day of each month during said year, cases ranging in quantity from 369 in January 1957 to 955 in October, 1956 and the value of said cases ranged from $10,110.00 to $23,167.00.

As to Stewart it had held a wholesale liquor license for six years and was the successor of an individual who had had a wholesale license for twenty years. It had its place of business on North Highland and in two other warehouses in Los Angeles. It had a capital investment of $250,000.00 of which $65,000.00 belonged to the individual predecessor. It sold bourbon and scotch whiskey, rum and rectified spirits to any retailer who could pay for the liquor. Some of its sales were based upon orders received previous to obtaining the liquor

from a supplier. From June 1, 1956 to May 31, 1957 it sold 40,803 cases of distilled spirits of the value of $1,590,032.63 to retailers. It had on hand in the warehouse on the first day of each month during said year cases ranging in quantity from 1594 in March, 1957 to 4,921 in November, 1956 and the value of such cases ranged from $69,017.30 for the first quarter ending August, 1956 to $156,082.11 for the quarter ending November, 1956. Five percent of its annual case sales to retailers for said year was 2040.15 cases.

As to Ambrose, it had been licensed for four years and the place of business was located on East Second Street in Los Angeles where it had 4400 square feet of warehouse space and 2000 square feet of office space. There was capital investment of about $40,000.00 in the business and three salesmen were employed. Bourbon whiskey was handled exclusively and most of the purchases were made from two distilleries in Kentucky. Sales were made to retailers generally. In some instances orders were first obtained from retailers before an order would be placed with the distillery. During the period from June 1, 1956 to May 31, 1957, 25,218 cases of distilled spirits valued at $923,015.43 were sold to retailers. Ambrose had on hand in the warehouse on the first day of each month cases ranging in quantity from 16 in March, 1957 to 1,234 in November, 1956 and the value of such cases ranged from $543.48 in March, 1957 to $44,420.00 in November, 1956. That five percent of the annual case sales to retailers was 1260.90 cases.

Appellants assert that (1) Rule 28 is invalid, and (2) that the findings of fact are insufficient.

Section 22 of Article XX of the California Constitution granted to the Legislature the power to enact laws governing and controlling the liquor industry and to license those engaged in it and created the Department, granting to such Department the power and duty to enforce the terms of the Constitution and the laws enacted by the Legislature concerning the manufacture, sale and consumption of alcoholic beverages. Pursuant to the Constitutional directive the Legislature enacted the Alcoholic Beverage Control Act. (Sections 23000 to 25762 Business and Professions Code.) Any section hereafter referred to will be of the Business and Professions Code unless otherwise stated.

Section 23001 states the purpose of the act as follows:

"This division is an exercise of the police powers of the State for the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages. It is hereby declared that the subject matter of this division involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people. All provisions of this division (sic) shall be liberally construed for the accomplishment of these purposes."

The "economic" welfare which will be achieved by strict regulation and curtailment of the use of liquor and the economic benefits resulting to the people from the promotion of temperance, rather than those resulting from the promotion of the liquor industry is, the welfare which is meant by such section. (*American Dis-*

tilling Co. v. State Board of Equalization, 144 Cal. App. 2d 457.)

The Legislature in this particular field of activity has made it mandatory upon the Department to make rules and regulations necessary to carry out the intent and purposes of the constitutional provisions. (Section 25750.) Pursuant to such mandate the Department adopted rules and regulations including among others Rule 28. See, Title 4, Chapter 1, Sections 1-145, California Administrative Code; *Sibert v. Department of Alcoholic Beverage Control*, 169 Cal. App. 2d 563, *Joseph George, Distr. v. Department Alcoholic Beverage Control*, 149 Cal. App. 2d 702 and *Mercurio v. Department of Alcoholic Beverage Control*, 144 Cal. App. 2d 626.

There is in this state as a result of the constitutional provisions, Legislative enactment and administrative rules and regulations, a complete and comprehensive set of laws which cover the liquor industry. It is generally agreed that the liquor industry is one which greatly affects the public health, safety, welfare and morals of the people (*Schaub's Inc. v. Department of Alcoholic Beverage Control*, 153 Cal. App. 2d 858, 867), that those in the industry must operate subject to strict control of constitutional authorities. (*Cooper v. State Board of Equalization*, 137 Cal. App. 2d 672, 679.) Each applicant for a license must provide the department with certain information with reference to the applicant's background, crime record, status and other data (Sections 23950-23958), and must subject himself and the premises where the business will be conducted to a thorough investigation. (*Weiss v. State Board of Equalization*, 40 Cal. 2d 772.)

Section 23779 reads as follows:

"No wholesale license shall be issued to any person who does not in good faith actually carry on or intend to carry on a bona fide wholesale business by sale to retail licensees of the alcoholic beverage designated in the wholesale license, and the department may revoke any wholesale license when the licensee fails for a period of 45 days actively and in good faith to engage in the wholesale business and shall revoke any distilled spirits wholesaler's license held by any person who fails to comply with applicable provisions of Sections 23378, 23379, 23776, 23777, and 23778. Sale by a wholesale licensee to himself as a retail licensee is not the transaction of a bona fide wholesale business."

A wholesaler is restricted by Section 23780 which reads as follows:

"No distilled spirits wholesaler's license or rectifier's license shall be issued or renewed to any person who holds on deposit funds obtained from any retailer, which funds were obtained for the purpose of applying them, either in whole or in part, toward the payment of any future delivery of distilled spirits to the retailer."

And, Section 23778 reads as follows:

"A distilled spirits wholesaler's license shall not be held by any person *unless at all times throughout the license year he has on his wholesale premises a reasonable stock of distilled spirits, as determined by the department, for which he has fully paid lawful money or its equivalent.*" (Emphasis added.)

The trial judge in his memorandum of decision stated the following with reference to the last quoted section:

"Having in mind the plenary power of the legislature, the section quoted last above lays down the valid requirement, that none may hold a distilled spirit wholesaler's license 'unless at all times throughout the year he has on his wholesale premises a reasonable stock of distilled spirits, *as determined by the department*, . . .' The effect thereof is the prescription of requirements (1) that the maintenance of a reasonable stock on hand is a prerequisite to holding this type of license and (2) the Department of Alcoholic Beverage Control shall determine what constitutes 'a reasonable stock of distilled spirits.'

"The department has performed that duty by promulgating rule 28, which prescribes minimum requirements which all such licensees must meet. Even if we consider the absurd situation of a wholesaler making only sales of one dollar or of any amount up to two million dollars per year the same yard stick, of five per cent, is applied, and he is required to keep on hand 'slightly over a two weeks' average supply. There is no discrimination or unequal application in such a provision. On its face it appears to negate the allegations in that regard."

As we view it Rule 28 is the result of a valid exercise of the police power and is constitutional. By adopting the rule the Department simply, among other things, determined what constitutes "a reasonable stock of distilled spirits." The rule provides minimum requirements which all wholesalers must meet and there can be no legitimate claim that there is any discrimination or unequal application in the rule.

The plaintiffs' main contention is that they do not have sufficient capital to keep on hand a stock equal to five percent of their annual sales, which latter for

each is between $483,392,087 and $1,402,209,33. But lack of capital is no reason to invalidate the rule under the circumstances of this case. As the trial court stated:

". . . Probably there is no license law laying down prerequisites, but someone is unable to comply, whether the precedent is education, training, proof of character, a bond or stock of merchandise. In fact, one of the major purposes behind most licensing laws is to restrict activity in the field to those who can qualify and to prohibit it by those who cannot."

There was no evidence introduced other than the plaintiffs' inability to provide such funds, to show that the five percent figure was too high. The trial court pointed out that:

". . . The evidence on behalf of defendants (Exh. D) shows that before promulgating the rule, the department ascertained (1) there is a general practice to reduce inventories on March first to the lowest point during the year because of taxes and (2) that of 143 distilled spirit wholesalers reporting, the average inventory on March 1, 1950 (prior to the rule) was eleven per cent of annual sales. The rule establishes a requirement less than half thereof. This negates any claim of discrimination or unreasonableness."

Contrary to the appellants' contention that part of the rule reading "the stock of distilled spirits herein required shall be: (a) owned by him, (b) not held on consignment, (c) not acquired pursuant to a prior agreement to sell it to a specific licensee or licensees" neither permits nor prohibits advance sales, it merely provides that pre-sold merchandise shall not be counted in the stock required to be kept on hand in the warehouse.

In other words it provides in effect that the stock kept on hand shall not be held on consignment nor be acquired pursuant to prior sales agreement with a retailer. It means that stock belonging to someone other than the licensee or stock which is pre-sold will not be counted in the stock required to be kept on hand in the warehouse.

One of the purposes of the Alcoholic Beverage Control Act is to bring into being a class of true wholesalers to whom retailers can come for their supplies and be certain that they are dealing with a bona fide wholesaler and not dealing with a phone-order business concern, a commission merchant or a distiller's representative.

Some idea of the importance of the rule is gained when it is considered that as of April 1, 1957, there were 17,301 licensed retail premises in California selling distilled spirits and these retailers had to purchase their liquor from licensed wholesalers, no other means of purchase being lawful. (Sections 23374.5, 23375.5, 23378.)

As to the size of the warehouse, the Department under the first qualification wanted to make certain among other things that a wholesaler has a bona fide place of business where retailers may go to view, select and obtain merchandise. It would be of little use to determine the extent of a "reasonable stock" if the licensee had no place to store it.

As to the third provision, it is apparent that the Department wanted to provide that each wholesaler will be available to all retailers, thereby giving every retailer the right to buy from anyone in the licensed class with

whom he must deal and thereby preventing the reoccurrence of the "tide-house" which promoted restraints of trade during pre-prohibition times. (*Black v. Magnolia Liquor Co., Inc.*, 355 U. S. 24, 78 S. Ct. 100.)

The final paragraph of the rule provides that certain licensees who sell to a certain percentage of the retailers in the county where their licensed premises are located or those whose sales of spirits during any 12-month period consist of 50 percent or more of individual sales in quantities of ten cases or less are conclusively presumed to be selling to retailers generally. This is not a minimum requirement but is merely a measuring device whereby those who can meet either of such categories are conclusively presumed to be selling to retailers.

The appellants have failed to establish that the rule is invalid. An administrative rule which is legislative in character is subject to the same test with reference to its validity as is an act of the Legislature. (*Knudsen Creamery Co. v. Brock*, 37 Cal. 2d 485, 494.) The same principles govern administrative rules as govern statutes. (*California Drive-In Restaurant Ass'n v. Clark*, 22 Cal. 2d 287, 292.) The presumption is that the rule under the circumstances set forth in this instance is reasonable and proper. (*Bess v. Park*, 144 Cal. App. 2d 798, 804.)

The Department is well within its rights to require a high standard of economic stability for those who are to hold wholesalers licenses. (*Schaub's Inc. v. Department of Alcoholic Beverage Control, supra*, 153 Cal. App. 2d 858.)

As to appellants' last contention. A complete reading of the record indicates that the court made comprehensive and sufficient findings. We think that it was not required that findings be made as to those particular matters referred to in the appellants' brief.

The judgment is affirmed.

FOURT, *J.*

We concur:
WOOD, *P. J.*
LILLIE, *J.*